DIVISION II

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
JUDGE KAREN R. BAKER

CA05-1143

APRIL 26, 2006

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[CV2004-4248]

HONORABLE BARRY ALAN SIMS, CIRCUIT JUDGE

AFFIRMED IN PART; REVERSED and REMANDED IN PART

RODNEY NELSON, OZELLE NELSON, LANCE NELSON and TORY NELSON

APPELLANTS

v.

RUSH HARDING and FERRELLGAS

APPELLEES

Appellants Rodney and Ozelle Nelson, individually and as parents and next friends of Lance and Tory Nelson, challenge the trial court's granting of appellee Rush Harding's motion for summary judgment and appellee Ferrellgas's motion for summary judgment. We find no error and affirm the grant of summary judgment for Rush Harding. However, we agree that the grant of summary judgment for Ferrellgas was in error and reverse.

On or about April 9, 2004, appellants filed a complaint against Rush Harding and Ferrellgas. The complaint alleged that Lance Nelson was operating a vehicle on Pinnacle Valley Road when he encountered a substance on the road that caused him to slide out of control. It further alleged that Rush Harding had retained the services of Ferrellgas to perform work on his property and they negligently caused an oily substance to enter onto Pinnacle Valley Road. Appellants' allegations as to Rush Harding were that Mr. Harding was negligent in failing to maintain proper supervision of the work and to use ordinary care. Appellants additionally alleged that Ferrellgas was negligent in failing to keep a harmful substance from entering onto the roadway as well as to use ordinary care.

Both appellees filed timely answers, and discovery was conducted. Discovery revealed that Mr. Harding had contracted with Ferrellgas to apply a substance on his dirt road to address a dust

problem. This substance was identified by the product name of Dustmaster Plus, with the chemical name identified as magnesium chloride brine, formula MgCl 2. Discovery also produced testimony that the substance on Mr. Harding's private dirt road was subsequently transferred by traffic on the dirt road to the public paved road of Pinnacle Valley. Testimony also identified a mist of rain on the day of the accident. After depositions, both Rush Harding and Ferrellgas filed motions for summary judgment.

The trial court granted Rush Harding's motion specifically finding that appellants had failed to present any proof in their response to Mr. Harding's motion for summary judgment that any of the three exceptions to the general rule that an employer is not responsible for the negligence of his or her independent contractor applied in this case.

The trial court's order granting Ferrellgas's motion for summary judgment merely states that the motion was well taken. However, the order granting Mr. Harding's motion also specifically found that appellants failed to meet their burden of proof that the Dustmaster product applied by Ferrellgas on the dirt road caused Lance Nelson's accident and the alleged damages.Rule 56 of the Arkansas Rules of Civil Procedure governs disposition of summary-judgment cases and states, in pertinent part:

> (c) *Motion and Proceedings Thereon.* (1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits.... (2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion.
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> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

On appeal, we decide if the grant of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Dev. & Constr. Management, Inc. v. N. Little Rock,* 83 Ark. App. 165, 119 S.W.3d 77 (2003). The burden of sustaining a motion for summary judgment is on the movant. *Wingfield v. Contech Const. Prods., Inc.,* 83 Ark. App. 16, 115 S.W.3d 336 (2003). All proof submitted must be viewed in the light most favorable to the party resisting the motion, and any doubts or inferences are resolved against the moving party. *Id.* Once the moving party has established a prima facie entitlement to summary judgment by affidavits or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* Summary judgment is appropriate under Ark. R. Civ. P. 56(c) when there is no genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law. *Id.*

Under prior law, summary judgment was somewhat disfavored and was viewed as a "drastic remedy." This is no longer the case. As Justice Lavenski Smith said in *Flentje v. First National Bank of Wynne,* 340 Ark. 563, 11 S.W.3d 531 (2000):

> [W]e will not engage in a "sufficiency of the evidence" determination. We have ceased referring to summary judgment as a drastic remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admission on file is such that the nonmoving party is not entitled to a day in court, *i.e.,* when there is not any genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law. However, when there is no material dispute as to the facts, the court will determine whether "reasonable minds" could draw "reasonable" inconsistent hypotheses to render summary judgment inappropriate. In other words, when the facts are not at issue but possible inferences therefrom are, the court will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds might differ on those hypotheses.

Id. at 570, 11 S.W.3d at 536 (internal citations omitted).

The fact that the relationship between Mr. Harding and Ferrellgas was that of principal and independent contractor was undisputed. The general rule is that an employer is not responsible for

the negligence of his or her independent contractor. *Stoltze v. Ark. Valley Elec. Co-op. Corp.*, 354 Ark. 601, 127 S.W.3d 66 (2003). However, there are exceptions to the rule. *Id*. An employer may be held liable for the conduct of a careless, reckless, or incompetent independent contractor when the employer was negligent in hiring the contractor. *Id*. There is also an exception where the employer has undertaken to perform certain duties or activities and negligently fails to perform them thereafter or performs them in a negligent manner. *Id*. In addition, an employer may be liable to third parties when he or she delegates to an independent contractor work that is inherently dangerous. *Id*.

Appellants first challenge the entry of summary judgment alleging that there was sufficient dispute as to whether Rush Harding was negligent in the hiring of Ferrellgas to create a fact

question. They allege that a friend referred Ferrellgas to Mr. Harding, that Mr. Harding did not thoroughly review the brochure with regard to the substance applied to the road, and that Mr. Harding had no real knowledge of the product applied by Ferrellgas. However, appellants cite no case law to support their proposition that these facts establish an inference that Mr. Harding was negligent in obtaining the services of Ferrelgas. Further, testimony that Mr. Harding had utilized Ferrellgas's services in the past without incident was undisputed.

In *Western Arkansas Telephone Co. v. Cotton,* 259 Ark. 216, 532 S.W.2d 424 (1976), our supreme court stated:

> Although there is some authority to the contrary, it has generally been held that the duty rests on the employer to select a skilled and competent contractor, and the employer is liable to third persons for the negligent or wrongful acts of an independent contractor employed by him where he knew his character for negligence, recklessness, or incompetency at the time he employed him, or where the employer was negligent in failing to exercise reasonable care in the selection of a competent contractor. However, where the independent contractor is in fact a competent person to perform the work, it is of no consequence whether or not due care was used in the selection. The fact that a contractor is negligent in respect of the work in question raises no presumption that the employer was guilty of negligence in employing him.

Cotton, 259 Ark. at 218, 532 S.W.2d at 426.

Furthermore, an employer who has previous successful experience with an independent contractor in the performance of his work cannot be held liable on the theory of the negligent selection of the contractor. *Stoltze*, *supra*. The burden of proof is upon the party alleging negligence to prove the employer either knew or should have known of the incompetency of the independent contractor. *Id*.

Appellants presented no evidence that Mr. Harding knew or should have known that Ferrellgas was incompetent. To the contrary, evidence showed that Mr. Harding had utilized the services of Ferrellgas in the past with no problems or difficulties. Accordingly, there was no error in the trial court's finding that this exception was not met.

Neither do we find error in the trial court's determination that appellants failed to establish the second exception where the employer has undertaken to perform certain duties or activities and negligently fail to perform them thereafter or perform them in a negligent manner. Appellants assert

that Mr. Harding was negligent in the failure to supervise the application of the substance and the failure to insure that the substance was not transferred to Pinnacle Valley Road. However, nothing in the evidence suggests that Mr. Harding ever undertook the duty to supervise the work delegated to his independent contractor. Mr. Harding himself testified specifically that he did not undertake to perform any duties or activities relating to the work performed by Ferrellgas on his property. Therefore, appellants' second argument also fails.

Appellants' third argument is also unavailing. Appellants contend that Mr. Harding employed Ferrellgas to perform an inherently dangerous task, namely the placement of a substance on a roadway subject to a large amount of automobile traffic. Appellants further argue that it should have been foreseen that should the substance, which was designed for use on gravel roads, be transferred to the asphalt surface of Pinnacle Valley Road, a dangerous condition would exist.

Our supreme court has explained that when a product is inherently dangerous, the danger of injury stems from the nature of the product itself. *Walker v. Wittenber, Delony & Davidson Inc.*, 241 Ark. 525, 412 S.W.2d 62 (1966). Inherently dangerous products include products like explosives and poisons. *Id*. A product's becoming dangerous because of misuse or damage does not render it inherently dangerous. *Id*. In the instant case, no evidence demonstrates that the chemical in question is dangerous by its nature, nor do appellants allege that it is inherently dangerous. Appellants' argument focuses on the issues of foreseeability and risk, terms of negligence claims not based on inherent danger. Accordingly, we find no error in the trial court's determination that appellants failed to establish that any of the three exceptions to the general rule that an employer is not responsible for the negligence of his or her independent contractor applied in this case. The order granting summary judgment to appellee Rush Harding is affirmed.

However, our standard of review requires that we reverse the grant of summary judgment awarded to appellant Ferrellgas. Ferrellgas argues that appellants cannot show Ferrellgas proximately caused the damages they allege they suffered or that they sustained damages from Ferrellgas's act or omission. Ferrellgas acknowledges in its argument that while usually an issue for

the jury, proximate cause becomes purely a question of law when reasonable minds could not differ about a causal connection between a defendant's alleged negligence and a plaintiff's damages. *See City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). Ferrellgas argues that reasonable minds could not differ about the lack of causal connection between Ferrellgas's alleged negligence and appellant's damages because appellants' visual and tactile descriptions of the substance they encountered contradicted testimony concerning how the substance Dustmaster appears and feels to the touch. The substance on the road was described as a brown, oily substance, while Ferrellgas asserts that Dustmaster is clear like water. Ferrellgas also contends that the substance on the road could have arrived on the road from a number of different and unidentifiable sources and specifically states that a soccer tournament was held that day on Mr. Harding's neighbor's property and hundreds of cars entered and exited the property via the dirt road. In addition, work on this same neighbor's property resulted in contractors and workmen entering and exiting the neighbor's property via the road from which appellants allege Ferrellgas's Dustmaster was tracked onto the main thoroughfare. Furthermore, there was a light misty rain on the day in question and the collision could have been caused by the rain.

We disagree with Ferrellgas's assertion that reasonable minds cannot differ. Mr. Harding testified that he believed that "when that sheet of that misty rain got on [the Dustmaster product], that would keep that hot sun from evaporating it," which would prevent the product from drying after application. Bob Lawson, the Ferrellgas employee who applied the substance to the dirt road, specifically stated in his deposition that the substance on Pinnacle Valley Road was the substance that he had applied to the roadway for Mr. Harding, mixed with dirt. He further testified that the Dustmaster product would get on his tires when he drove through it after application and acknowledged that the substance could be slippery when wet. In addition, a flyer for the Dustmaster product described the substance as a brown, viscous material having relatively high resistance to flow. The flyer's description is consistent with Mr. Lawson's description of the product as looking like water with a tint to it.

Reasonable minds could differ as to the conclusions presented by these facts. Accordingly, the matter is not appropriate for summary judgment, and we must reverse as to appellee Ferrellgas.

Affirmed in part; reversed and remanded in part.

BIRD and NEAL, JJ., agree.